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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 982

HANES HOSIERY DIVISION-HANES CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) and the findings, conclusions, and order of the district court (Pet. App. 9a–12a) are not yet officially reported. The underlying decision and direction of election of the Board's Regional Director are set forth at R. 8–9.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a–8a) was entered on October 4, 1967. The petition

[1] "R." refers to the appendix to the Board's brief in the court of appeals, a copy of which has been filed with the petition.

for a writ of certiorari was filed on January 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rule of the National Labor Relations Board that, prior to a representation election, an employer must furnish to the Board the names and address of the employees eligible to vote in the election—which information the Board then furnishes to the contestants in the election—is a valid exercise of the Board's statutory authority to establish fair and adequate election procedures.

2. Whether, where the employer refuses to furnish such information, the Board may compel its production by means of a proceeding in the federal district court.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966),[2] the National Labor Relations Board promulgated a rule which requires an employer to file with the Board's Regional Director, prior to the conduct of a representation election, a list of the names and addresses of the employees eligible to vote in the election, and provides that the Regional Director shall then make the list available to all contestants in the

[2] The *Excelsior* decision is set forth at R. 14–29.

election. In the present case the Board has applied that rule to the petitioner.

On April 5, 1966, the Textile Workers Union of America, AFL–CIO, filed a petition with the Board's Regional Director, pursuant to Section 9(c) of the Act, seeking certification as the collective bargaining representative of a group of the Company's employees (R. 7–8). Following a hearing, the Regional Director on July 19, 1966, directed that a representation election be conducted on August 17, 1966 (R. 8–13). Pursuant to the *Excelsior* rule, the Regional Director ordered the Company to furnish, within seven days, an "election eligibility list, containing the names and addresses of all the eligible voters," so that the Director could "make the list available to all parties to the election" (R. 13, n. 3).

The Company notified the Regional Director that it would not furnish the information. The Regional Director postponed the election and, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce, at its own or at the regional office, its records containing such information for inspection and copying by Board agents; or, alternatively, to file with the Regional Director a list of the employees' names and addresses (R. 30–31, 35–37). The Company did not comply with the subpoena. The Board then brought an action in the United States District Court for the Middle District of North Carolina to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply (R. 2–7).

The district court denied relief (Pet. App. 9a–12a). On appeal by the Board, the court of appeals reversed. It held (Pet. App. 6a):

> [F]airness in the elective process demands here, as it does in public or corporate elections, the opportunity of contesting parties to communicate their respective positions to the electorate. This includes such completeness of information, and timeliness of its dissemination, as will allow the voters to make a reasoned choice. The relief prayed in the complaint should be afforded; it may be rested on either Section 11 of the Act * * *, or the injunctive powers of the District Court, 28 USC 1337. We remand for such an order by that Court.

ARGUMENT

The unanimous holding of the court below that the Board may require an employer to furnish the names and addresses of employees eligible to vote in a representation election and may obtain such information through court action is clearly correct, and is in accord with the unanimous holding of the only other court of appeals which has decided the question.[3]

[3] *National Labor Relations Board* v. *Rohlen* (*Crane Packing Co.*), 66 LRRM 2481 (C.A. 7), No. 16096, November 3, 1967. Accord, *National Labor Relations Board* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal.), appeal pending (C.A. 9), No. 21883; *National Labor Relations Board* v. *Teledyne, Inc.*, 66 LRRM 2408 (N.D. Cal.), appeal pending (C.A. 9), No. 22354; *National Labor Relations Board v. Wolverine Industries Division*, 64 LRRM 2060, 2187 (E.D. Mich.); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, 66 LRRM 2327 (S.D. N.Y.); *Swift & Co.* v. *Solien*, 66 LRRM 2038 (E.D. Mo.); *National Labor Relations Board* v. *Wyman-Gordon Co.*, 65

There is consequently no need for review by this Court, and this long-delayed representation election can now be conducted.

1. Long ago, this Court recognized that, under Section 9(c)(1) of the Act, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees * * *." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. See also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226. The Board's *Excelsior* rule is a reasonable means of effectuating that objective. As the court below pointed out (Pet. App. 5a): "An informed electorate is essential if the result of an election is to be accorded its intended significance and accomplish its aim."[4] Moreover, as the Board pointed

LRRM 2763 (D. Mass.), appeal pending (C.A. 1), No. 7000. *Contra: National Labor Relations Board* v. *Montgomery Ward & Co.*, 64 LRRM 2061 (M.D. Fla.). *National Labor Relations Board* v. *Q-T Shoe Manufacturing Co.*, C.A. 140–67 (D.N.J., January 19, 1968).

[4] There is no inconsistency between this holding and the action of the Second Circuit in *J. P. Stevens & Co.* v. *National Labor Relations Board*, 67 LRRM 2055 (Pet. 8, n. 1), in declining to enforce the portion of the Board unfair labor practice order in that case which gave the union access to the names and addresses of the employees whom it was seeking to organize. The Second Circuit was of the view that the other provisions of the Board's order, which it enforced, afforded an adequate remedy for the unfair labor practices found in that case. However, the court was careful to distinguish the situation here, because the "need for an informed electorate" provides a special justification for requiring a list of the names and addresses of the employees prior to the conduct of a representation election. *Stevens*, *supra*, 67 LRRM at 2064.

out in *Excelsior* (156 NLRB at 1243): "Prompt disclosure of employee names as well as addresses will * * * eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity," and will tend to facilitate the settlement of other "disputes between employer and union over voting eligibility."

It is immaterial that for thirty years elections under the Act were conducted without the requirement now imposed (Pet. 12), since the Board is authorized, and indeed expected, to modify and improve its election procedures in the light of its accumulated experience. Cf. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. Petitioner's argument that prior to *Excelsior* unions already enjoyed organizational advantages which employers lack (Pet. 25–28) fails to consider that the employer and the union have a different relation to the employees,[5] and that the employer may make antiunion speeches to employees in the plant during both working and non-working time, while non-employee union organizers normally are not entitled to use the plant premises for organizational purposes.

The *Excelsior* requirement that information be furnished *to the Board,* which the Board will then pass along to all contesting unions, obviously does not violate Section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to "contribute

[5] While an employee is free to turn his back on union campaigners if he chooses, "Of course, he can't turn his back to the boss if the boss comes to the home. Not if he is in his right mind, he can't." *National Labor Relations Board* v. *Wolverine Industries Division*, 64 LRRM 2060, 2061 (E.D. Mich.).

financial or other support to" a labor organization (Pet. 12–14).[6] See *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 230–231; *Kimbrell* v. *National Labor Relations Board*, 290 F. 2d 799, 802 (C.A. 4). Similarly without substance is petitioner's contention that the rule infringes the employees' right "to refrain from" union activity, which is guaranteed by Section 7 of the Act, and also their constitutional rights to freedom of association and privacy (Pet. 14–24). The rule simply gives unions and other groups seeking representation rights an opportunity to reach the employees with their organizational message. It does not compel employees to read union literature mailed to them or to discuss the union with fellow employees or union representatives who might come to their homes for that purpose; and the employees are still free to exercise their statutory right to reject representation by voting against the participating unions in the secret-ballot Board election.[7]

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[6] The cases cited by petitioner (Pet. 13) do not hold to the contrary. In those cases, the employer furnished the employees' names and addresses to only one of two competing unions or groups, in an effort to influence the employees to select or retain the representative whom he favored.

[7] Petitioner's concern that the union may disclose the list of names and addresses to a rival employer, who in turn would pirate petitioner's employees, was fully answered by the court of appeals (Pet. App. 5a). In rejecting the same argument, the Seventh Circuit, in *National Labor Relations Board* v. *Rohlen*, 66 LRRM 2481 (see n. 3, *supra*), observed (p. 2482, n. 2): "Nothing in the record supports the argument that disclosing the names and addresses of employees will in the future or has in the past resulted in piracy"; it cannot be assumed that a union "will engage in conduct of this nature," or, if it does, that the Board will not "provide an appropriate remedy."

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2. The court below also correctly held, as did the Seventh Circuit (see n. 3, *supra*), that the Board could compel the production of such information by a subpoena enforcement proceeding.

Section 11(1) of the Act gives the Board subpoena power to require "testimony of witnesses or the production of any evidence" in its proceedings or investigations (App., *infra*, p. 12). Section 11(2) provides that, in case of a refusal to obey a subpoena, the district court may require the person subpoenaed "to produce evidence" or "to give testimony" (App., *infra*, p. 13). Petitioner contends (Pet. 34–37) that, since the employee names and addresses sought to be obtained will not be used by the Board to prove or disprove any fact in issue but will be made available to the union for electioneering purposes, the list cannot be regarded as "evidence" or "testimony" and hence is beyond the reach of the Board's subpoena power. Petitioner's interpretation of the Board's subpoena power is unduly restrictive.

The entire representation proceeding under Section 9 of the Act, from the filing of the petition to the certification of the election results, is "an investigation." See *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 707. The basic aim of this investigation is to ascertain the wishes of the employees as to representation and, as shown, the Board has reasonably concluded that the unions need to know the names and addresses of the eligible voters to assure that the

electorate will be adequately informed. In view of the admonition in the preamble to Section 11 to construe the Board's subpoena power as extending to "all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9" (App., *infra*, p. 12), the term "evidence," as used in Section 11, is properly construed as encompassing the employee list required under the *Excelsior* rule. *National Labor Relations Board* v. *Rohlen*, 66 LRRM 2481, 2483–2485 (C.A. 7).[8] See also *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692 (C.A. 10), affirming 34 F. Supp. 53, 56, 59–60 (D. Kans.). Cf. *United States* v. *Morton Salt Co.*, 338 U.S 632, 642–643, 652–653; *United States* v. *Powell*, 379 U.S. 48, 53–54.[9]

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[8] The Seventh Circuit added (66 LRRM at 2484):

> Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a disputed fact or something in issue, the "something in issue" in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.

[9] The court below alternatively held that the Board's suit to compel production of the list was also properly brought under 28 U.S.C. 1337, which gives the district court jurisdiction of all civil suits "arising under any Act of Congress regulating commerce." See *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501, 504; *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749, 752–753 (S.D.N.Y.), and cases cited therein. See, also, *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938, 940–941 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.
>
> * * * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or

within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

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